Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 75-901

EDWARD M. ESBER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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Petitioner submits herewith his jurisdictional statement as required by Rule 23 of the Rules of Supreme Court of the United States.

OPINION BELOW

The opinion below was decided by the United States Court of Appeals for the Fifth Circuit, Esber vs. United States, Case No. 75-2486, on November 6, 1975, attached hereto as Appendix.

GROUNDS FOR JURISDICTION

Petition for Writ of Certiorari to the Supreme Court of the United States is brought pursuant to 28 USC 1254 (1).

United States Court of Appeals for the Fifth Circuit rendered its opinion on November 6, 1975. Petition for Re-Hearing was denied in Order of the same court on November 26, 1975.

QUESTION PRESENTED

Whether the Petitioner was denied due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Fifth Amendment:

"Criminal actions - Provisions concerning - Due process of law and just compensation clauses.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property; without due process of law; nor shall private property be taken for public use, without just compensation."

Also Section 472 of Title 18 U.S.C. provides:

"Whoever buys, sells, exchanges, transfers, receives or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that same be passed, published, or used as true and genuine, shall be fined not more than $5000.00 or imprisoned not more than ten years, or both.

STATEMENT OF CASE

The defendant, Edward M. Esber, was indicted on three counts for violation of Title 18, USC Sections 2 and 472, that is for knowingly and willingly uttering a false or forged instrument. The defendant plead not guilty and was thereafter on March 26, 1975, tried and found guilty.

The government, in order to impute guilty knowledge to the defendant, Edward M. Esber, presented the testimony of several witnesses who generally stated that on the morning of December 6, 1974, the defendant and two other individuals rode in an automobile from Orlando, Florida to Ormond Beach, Florida, where the defendant presented a bank officer with a manila envelope containing ten counterfeit one hundred thousand dollar certificates of deposit. On the trip from Orlando to Ormond Beach, the defendant had opened the envelope, taken out one counterfeit bill and presented it to another occupant of the automobile. At the bank, the defendant, Esber merely presented the envelope to the bank officer and stated he was acting as attorney for a group of investors who wished to establish a line of credit. At that point another occupant of the automobile whom the defendant had previously met one day before engaged in negotiations with the bank officer to establish credit. The defendant did not receive any money or other thing of value from the bank and after obtaining a receipt left.

The counterfeit nature of the certificates of deposit was not immediately recognizable to the bank officer and only after verification by treasury agents was that fact established.

The government presented no further evidence to support their contention that the defendant knowingly and intentionally uttered counterfeit instruments.

ARGUMENT

It is clearly established that guilty knowledge may not be inferred from the mere possession of counterfeit instruments. *U.S. v. Alea*, (5th Cir. 1970) 433 Fed2d 948; *U.S. v. Bean*, (5th Cir. 1971) 443 Fed2d17; *U.S. v. Casey*, (5th Cir. 1970) 431 Fed2d 953; *U.S. v. Jiminez-Serrato*, (5th Cir. 1971) 451 Fed2d 523; *U.S. v. Johnson*, (9th Cir. 1970) 434 Fed2d 827; *U.S. v. Paz*, (5th Cir. 1967) 374 Fed2d 619; *U.S. v. Seay*, (5th Cir. 1970) 432 Fed2d 395.

In order for an inference of guilt to be drawn from circumstantial evidence the conduct of the defendant must clearly fall within one or more recognized categories; evidence of prior knowledge, acquisition of counterfeit obligations at a discount, attempts to abandon, confessions or statements inconsistent with common sense and logic, furtive conduct, repeated utterings and the general quality of the counterfeit obligations themselves.

The record is void of any evidence which would fall within the foregoing categories giving rise to an inference of guilty knowledge. It therefore follows that the District Court and the Court of Appeals, Fifth Circuit failed to apply the established standard of proof necessary as a matter of law to sustain the allegations and therefore denied the defendant due process of law.

CONCLUSION

For the aforesaid reasons, Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

Richard S. Rhodes
120 S. Court St., Suite 201
Orlando, Florida 32801
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, this 23 day of December, 1975.

RICHARD S. RHODES

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-2486
Summary Calendar

D. C. Docket No. 74-221-CR-ORL-R

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD M. ESHER,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 6, 1975

Issued as Mandate: DEC 4 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2486

U. S. COURT OF APPEALS
FILED
NOV 26 1975
EDWARD W. WADSWORTH
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD M. ESBER,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court for the
Middle District of Florida
- - - - -

ON PETITION FOR REHEARING

(NOVEMBER 26 , 1975)

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-2486
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD M. ESBER,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(November 6, 1975)

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

Appellant Edward M. Esber was convicted upon trial by jury of possessing, concealing, passing and uttering ten forged and counterfeit United States Treasury Bills, each in the denomination of $100,000, and of conspiracy to pass, utter and publish them as true, all in violation of 18 U.S.C. §§ 2 and 472.

The sole issue on appeal is the sufficiency of the evidence to support the verdict. A review of the record reveals substantial conflict between appellant's testimony and that of the Government witnesses and between appellant's trial testimony and his statements to investigating officers, concerning the source of the counterfeit bills and appellant's part in passing them. The evidence of the Government, if believed, was more than sufficient to establish defendant's

guilt. The jury obviously discredited Esber's testimony in exercising its function to assess his credibility. A jury verdict must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it. Glasser v. United States, 315 U. S. 60, 80, 62 S. Ct. 457, 469 (1942). The Government's evidence of appellant's guilt was substantial.

AFFIRMED.

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

No. 75-901

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In the Supreme Court of the United States

OCTOBER TERM, 1975

EDWARD M. ESBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-901

EDWARD M. ESBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his conviction for uttering counterfeit treasury bills.

After a jury trial in the United States District Court for the Middle District of Florida, petitioner and a co-defendant, Joseph Amato, Jr., were convicted of possessing counterfeit obligations of the United States (ten counterfeit $100,000 United States Treasury bills) and of passing them with intent to defraud, in violation of 18 U.S.C. 472 and 2; they were also convicted of conspiracy to pass, utter, and publish as genuine such counterfeit obligations of the United States, in violation of 18 U.S.C. 371. Petitioner was sentenced to concurrent six-month prison terms on each of three counts. The court of appeals affirmed (Pet. App.).

The evidence at trial showed that co-defendant Amato contacted Robert Spicer, a businessman in Orlando,

Florida, and told him that he needed a line of credit in connection with a planned business endeavor in central Florida. In subsequent conversations Amato told Spicer and a business associate that he could assist them in obtaining a construction performance bond that they needed in order to commence a project in Alabama, and that he would be coming to Orlando with an associate to make the necessary arrangements (Tr. 51-60).

On December 5, 1974, Amato returned to Orlando and told Spicer that he could provide about $1,000,000 in collateral in order to get a line of credit but that he did not have the collateral with him (Tr. 61-70). Later that day petitioner joined Amato, Spicer, and others for dinner (Tr. 69). The next morning they arranged for Amato to check out an automobile dealership in Orlando while petitioner, his business associate DeLambo, and Spicer were to deposit the collateral in an Ormond Beach, Florida bank.

Upon arriving at the bank, petitioner attempted to give a secretary an envelope containing ten counterfeit $100,000 Treasury bills, but he was told he would have to give the bills to Douglas Brady, the vice president and trust officer (Tr. 79-80, 393-397). Thereafter Spicer introduced petitioner to Brady as an attorney from Cleveland who had a million dollars in Treasury bills to deposit in a trust account. Petitioner gave Brady the ten counterfeit $100,000 Treasury bills, obtained a receipt, and stated that he would like to replace the bills prior to their expiration date in April 1975 when, in the course of the usual practice, the bank would cash them in (Tr. 85-93).

After petitioner had left, Brady examined the bills more closely and discovered that certain portions of two letters were missing, that some of the letters were blurred, and that the paper did not appear to be of the type on which government obligations are printed (Tr. 340, 346-348). Subsequent investigation by federal authorities revealed that the bills were counterfeit.

Petitioner's contention that the evidence was insufficient to sustain his conviction rests on the claim that his possession and uttering of counterfeit bills did not support the jury's finding that he had guilty knowledge. The evidence, however, showed that petitioner possessed not a small amount of counterfeit money but $1,000,000 in counterfeit bills of poor quality and appearance. Beyond this, when he deposited them at the bank, he appeared nervous and stated that, contrary to the normal practice, the bills would be replaced prior to maturity.[1] In addition, petitioner's testimony that Spicer had invented the entire episode for his own purposes was disbelieved by the jury. And, as the court below pointed out, there was a substantial conflict between petitioner's trial testimony and his statement to the investigators.

In short, the jury had ample evidence to conclude that petitioner had the requisite criminal intent to warrant a conviction. As the court stated in *United States* v. *Barham*, 466 F.2d 1138, 1140 (C.A. 9), certiorari denied, 410 U.S. 926:

> The jury was not bound to accept appellant's testimony that he did not know that the currency was counterfeit. It was not bound to accept, as true, his account of the circumstances of the acquisition of the counterfeit currency which, to say the least, borders upon incredulity. It was not bound to accept his explanation of the use of the alias. All such circumstances were reasonably susceptible to the drawing, by the jury, of inferences adverse to appellant's contentions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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[1]Had the bills been cashed in by the bank at maturity, their counterfeit nature would have been recognized.